UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALICE M. BENTON, Plaintiff, v. JOHN E. POTTER, Postmaster General, U.S. Postal Service, Defendant.	No. C01-1444 BZ **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, an African-American female born on January 10, 1930, was hired by defendant U.S. Postal Service ("Postal Service") in 1970 as a distribution clerk for the Oakland Processing and Distribution Center.[1] In 1983, plaintiff became a flat sorter machine operator. Her duties included working with a team of six people to load mail into the machine, code the mail and remove the mail from the machine. For the machine to operate effectively,

[1] The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings including entry of final judgment pursuant to 28 U.S.C. § 636(c).

it is essential that the team assigned to it be able to work together and communicate with each other. (Ramos Decl., Am. Ex. 3 at 164:5-166:7.)

In May, 1994, following an investigation into a series of plaintiff's co-workers' complaints, some of which alleged that plaintiff made threatening remarks towards her co-workers, (Ramos Decl., Exs. 5-6), plaintiff's supervisor requested that she be scheduled for a psychiatric fitness for duty examination. On June 29, 1994, Dr. Stephen Raffle examined plaintiff. He diagnosed her with “Delusional (paranoid) Disorder” and “Paranoid Personality Disorder,” and concluded that, as a result of her condition, she was not able to work as a flat sorting machine operator, and an accommodation for her disability was not possible. (Ramos Decl., Ex. 2 at 10-12.) Based on Dr. Raffle's diagnosis, plaintiff was found not fit for duty and was placed on non-duty status on July 26, 1994. Plaintiff was notified that she could return to work when she certified that she had obtained treatment as recommended by Dr. Raffle. Plaintiff never returned to work. On December 31, 1996, she retired from her position with the Postal Service. She filed a charge with the EEOC and received a right to sue letter on January 22, 2001.

On April 12, 2001, plaintiff, acting pro se, filed a complaint against the Postal Service pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, alleging that its refusal to return her to work after placing her on non-duty status was discriminatory

based on her race, gender, disability and age.[2] At the case management conference in October, 2001, I scheduled the last day to hear dispositive motions on May 29, 2002, and set a trial date of July 8, 2002. After hearing from neither party for the next seven months, defendant first requested an extension of time to file its summary judgment motion on May 22, 2002. I denied defendant's request, (May 24, 2002 Order), and on July 2, 2002, held a pretrial conference at which both parties attended. At the conference and in my Pretrial Order, I reminded plaintiff that she had the burden to establish an initial case of discrimination in a Title VII case by offering evidence that gives rise to an inference that she suffered discrimination based on her race, gender, disability or age. I again encouraged her to renew her efforts to obtain counsel.[3] On the day of trial, plaintiff requested a continuance in order to attend a meeting with an attorney she stated was interested in representing her. I granted the continuance and gave defendant leave to refile its motion for summary judgment. (July 9, 2002 Order.) Plaintiff later informed the court that the attorney

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[2] Title VII does not address discrimination based on age or disability. Construing plaintiff's pro se complaint liberally, however, I will treat plaintiff's allegations of discrimination based on disability as a claim pursuant to the Rehabilitation Act, 29 U.S.C. § 794, and plaintiff's allegations of discrimination based on age as a claim pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a.

[3] Throughout this litigation, I have recommended to plaintiff that she try to obtain counsel, but she has been unsuccessful to this date.

declined to represent her. Defendant now moves for summary judgment, arguing that as a matter of law, plaintiff has failed to support any of her claims for discrimination. Plaintiff filed no opposition and failed to appear at the September 4, 2002 hearing.

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if a reasonable jury could return a verdict in favor of the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court does not make credibility determinations or weigh conflicting evidence, and views the evidence in the light most favorable to the nonmoving party. See T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-631 (9th Cir. 1987)(citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

In order to establish a prima facie case of disparate treatment under Title VII, plaintiff must present evidence "that gives rise to an inference of unlawful discrimination." Sischo-Nownejad v. Merced Community College, 934 F.2d 1104, 1110 (9th Cir. 1991)(citations omitted). Plaintiff may use direct or circumstantial evidence of discrimination. See id. The amount of

evidence plaintiff must produce for the prima facie case is "very little." Id. at 1111. Plaintiffs commonly follow the model for presenting circumstantial evidence first established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Using the McDonnell-Douglas model in this case, plaintiff would have to present evidence that: 1) she is a member of a protected class, 2) she was qualified for the position, 3) she was subject to an adverse employment action, and 4) similarly situated employees not in her protected class were treated more favorably. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002). If plaintiff succeeds in producing evidence sufficient to raise an inference of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision. See id. Once the defendant rebuts the inference of discrimination, the plaintiff must show that the articulated reason for the employment action is a pretext for discrimination. See id.

Despite repeated requests to plaintiff to state the factual basis for her claim that defendant's decision to place her on non-duty status was impermissibly motivated by considerations of race and gender, plaintiff failed to submit an opposition to defendant's motion. I have searched the record on my own, and even assuming that the limited amount of evidence plaintiff submitted in preparation for trial would be admissible, she still fails

to state a claim for disparate treatment based on race or gender. For example, plaintiff has not established that the adverse employment action was caused by her protected status. "[P]urely conclusory allegations of alleged discrimination, with no concrete, relevant particulars, will not bar summary judgment." Forsberg v. Pac. Bell N.W. Tel. Co., 840 F.2d 1409, 1418-19 (9th Cir. 1988). See also Goberman v. Oregon Dep't of Transp., 2000 WL 137090 at *5 (D. Or. Feb. 3, 2000) ("[Plaintiff's] subjective belief that he suffered an adverse employment decision for discriminatory reasons is not sufficient to establish a prima facie case of discrimination."). Moreover, plaintiff offers no evidence that similarly situated employees that were either male or in another racial group were treated more favorably than she was treated.

Even if plaintiff were able to establish a prima facie case of disparate treatment based on race or gender, the evidence before me overwhelmingly supports the conclusion that defendant had a legitimate and nondiscriminatory motive behind its decisions to order a fitness for duty examination and place plaintiff on non-duty status. After receiving a number of complaints from plaintiff's co-workers about her hostile and abusive behavior, (Ramos Decl., Am. Ex. 3 at 139:14-142:20; Exs. 5-7), defendant required plaintiff to submit to a fitness for duty exam. Defendant then decided to place plaintiff on non-duty status after receiving Dr. Raffle's diagnosis of her mental condition. There is no evidence in the record for the

proposition that defendant's decisions were impermissibly based on plaintiff's race or gender. Therefore, I find that plaintiff has failed to establish as a matter of law a claim under Title VII for disparate treatment based on race or gender.

Although I am mindful that "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment," Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir.), cert. denied, 516 U.S. 817 (1995), plaintiff might argue that she has produced enough evidence to sustain claims of sexual harassment and retaliation under Title VII. Sexual harassment is actionable when it creates a hostile or abusive work environment. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986). To prove a case of sexual harassment, plaintiff must show that: 1) she was subjected to verbal or physical conduct of a sexual nature, 2) the conduct was unwelcome, and 3) the conduct was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995)(citations omitted). The working environment must be both subjectively and objectively abusive. See id. (citing Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993)). "Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics." Id.

From reviewing plaintiff's pretrial submissions, it is possible to glean the beginnings of a sexual harassment claim. Plaintiff submitted a declaration, originally executed on February 25, 1993 and presented in an action filed by a co-worker against defendant, in which she states that she has been harassed for many years and that her supervisor has told her to ignore it. (Benton Decl. at 2:1-12.) However, this is the extent of plaintiff's evidence. Plaintiff provides no specific details about any conduct she was exposed to, nor does she demonstrate the severity or pervasiveness of the conduct by showing any alteration in her working conditions. Without more, plaintiff's conclusory statements are not enough to defeat defendant's summary judgment motion.

To make out a prima facie case of retaliation under Title VII, a plaintiff must show that: 1) she acted to protect her rights under Title VII, 2) the employer subsequently took an adverse employment action against her, and 3) there is a causal link between the two events. See Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995). If plaintiff is successful, the burden of production shifts to defendant to advance a legitimate, nondiscriminatory reason for the adverse action. See id. Plaintiff must then show that defendant's reason was merely pretextual. See id. The Ninth Circuit, adopting the EEOC's definition, has held that "adverse employment action" means "any adverse treatment that is based on a retaliatory motive and is

reasonably likely to deter the charging party or others from engaging in protected activity." Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000). This interpretation includes "lateral transfers, unfavorable job references, and changes in work schedules" but does not cover "every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity." Id. at 1243.

In preparation for trial, plaintiff produced evidence that she had filed an Equal Employment Opportunity ("EEO") complaint prior to defendant's decision to place her on non-duty status. Even viewing this evidence in the light most favorable to the plaintiff, the mere fact that an EEO complaint was filed before an adverse employment decision was made is not enough to withstand summary judgment on a Title VII retaliation claim, especially considering that defendant submitted testimony from plaintiff's supervisor that she was aware of plaintiff's complaint and it had no impact on her decision to request a fitness for duty examination. (Ramos Decl., Am. Ex. 3 at 166:20-167:3.)

Defendant also moves for summary judgment on plaintiff's claim of discrimination based on her disability. In order to establish her prima facie case under the Rehabilitation Act, plaintiff must demonstrate that she 1) is an individual with a disability within the meaning of the Rehabilitation Act, 2) is otherwise

qualified for the position, and 3) was discriminated against solely because of her disability. See Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1174 (9th Cir. 1998). A person is considered disabled if she has a physical or mental impairment that substantially limits one or more major life activities, if she has a record of such impairment, or if she is regarded as having such an impairment. See 29 U.S.C. § 705(20)(b). See also Thornhill v. Marsh, 866 F.2d 1182, 1183 (9th Cir. 1989)(holding that a person is disabled either if he has a disability or if he is regarded as having a disability). A person is "otherwise qualified" if she can perform the essential functions of the position with or without reasonable accommodation. See 29 C.F.R. 1630.2(m). "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position. See 29 C.F.R. 1630.2(n)(1).

Viewing the evidence in the light most favorable to plaintiff, she has failed to show that she was otherwise qualified to be a flat sorter machine operator.[4] Plaintiff's supervisor testified that the essential functions of the position require a flat sorter machine operator to be able to work together and communicate with the other members of her team. (Ramos Decl., Am. Ex. 3 at

[4] Defendant does not dispute that plaintiff is disabled within the meaning of the Rehabilitation Act.

164:5-166:7.) Plaintiff has failed to dispute Dr. Raffle's medical report, which states that as a result of her paranoid disorder, plaintiff is not able to work as a flat sorting machine operator, and it is not possible for defendant to accommodate her disability. (Ramos Decl., Ex. 2 at 10-12.) Specifically, Dr. Raffle found that plaintiff's "underlying irritability, persecutory nature, social isolation and misperception of reality significantly interferes with her ability to relate to other people." (Id. at 11.) His findings reflect plaintiff's co-workers' repeated complaints about her behavior. (Ramos Decl., Am. Ex. 3 at 139:14-142:20; Exs. 5-7.) Absent any evidence to the contrary, plaintiff has failed as a matter of law to establish that she was otherwise qualified for her position. See, e.g., Boldini v. Postmaster Gen., 928 F. Supp. 125, 131-32 (D.N.H. 1995)(postal service employee with mental disability whose behavior led to a hostile atmosphere with her co-workers was not otherwise qualified for her position).

Additionally, plaintiff is unable to establish, as a matter of law, that the adverse treatment was based on her disability alone, not on conduct caused by the disability. See Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1996) (Rehabilitation Act does not immunize employee from adverse employment action when misconduct caused by alcoholism would otherwise justify termination). As previously mentioned, defendant requested a fitness for duty examination for plaintiff after receiving a number of

complaints from her co-workers. Dr. Raffles' diagnosis merely confirmed that plaintiff's medical condition contributed to the problems she was experiencing with her co-workers. Defendant's decision to place her on non-duty status until she received treatment for her condition was not due solely to the fact that she was diagnosed with a paranoid delusional disorder, but rather because her conduct at work was impaired. I can find nothing in the record, and plaintiff has offered no response, to dispute defendant's legitimate explanation.

Finally, defendant argues that as a matter of law, plaintiff fails to state a claim for discrimination based on her age. Under the ADEA, "[a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . in the United States Postal Service . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). In order to establish a prima facie case under the ADEA, plaintiff must show that 1) she was within the protected age group (over 40 years old), 2) she performed her job satisfactorily, 3) she was discharged, and 4) she was replaced by a substantially younger employee with equal or inferior qualifications. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000), cert. denied, 533 U.S. 950 (2001). If plaintiff succeeds, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision. See id. Once the defendant rebuts the inference of discrimination, the plaintiff must show that the

articulated reason for the employment action is a pretext for discrimination. See id.

Although plaintiff stated during her deposition that one of her supervisors might have urged her to retire because she was the oldest employee in her group, (Ramos Decl., Ex. 12 at 36:4-25), she has failed to offer any evidence that after she was placed on non-duty status, she was replaced by a substantially younger employee with equal or inferior qualifications. Furthermore, as discussed above, even if plaintiff was able to meet her initial burden, defendant has articulated a legitimate, nondiscriminatory reason for placing her on non-duty status. As a matter of law, therefore, plaintiff has failed to state a claim for discrimination based on her age.

For the foregoing reasons, **IT IS HEREBY ORDERED** that defendant's motion for summary judgment is **GRANTED**.

Dated: September 4, 2002

Bernard Zimmerman
United States Magistrate Judge